IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA-10-0068

On Appeal from the Montana Fifth Judicial District Court, Broadwater County, Honorable Loren Tucker

APPEALLANTS' BRIEF

JOAN Y. CLARK and VICTORIA LYNNE SMITH,

Plaintiffs and Appellees,

v.

ROBERT ROY PENNOCK, MARILYN FROST, formerly known as MARILYN PENNOCK, DONALD R. BERNARD, ELIZABETH P. BERNARD and JAMES C. KOCH and THOMAS A. KOCH,

Defendants and Appellants.

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d. **Did the District Court Err when it Concluded that Mrs. Frost's Gate must be Removed?**

STATEMENT OF THE CASE

This is an appeal from the erroneous ruling of the district court granting Smith and Clark a new easement over a road (hereinafter "Scenic Drive") never previously used by Smith and Clark or their predecessors in interest. For twenty years prior to filing their complaint, Smith and Clark and the predecessors in interest accessed their property (hereinafter "Tract 15") by using Prospectors Loop Road (hereinafter "Prospectors Loop.") Smith and Clark sued, stating that the plain language of the conveying documents granted them an easement over Scenic Drive. Defendants Marilyn Frost, Robert Pennock, Donald and Elizabeth Bernard and James and Thomas Koch (hereinafter referred to as "Frost, Bernards and Koches") responded stating that the plain language of the conveying documents limited Smith and Clark's access to Prospectors Loop.

Plaintiff filed for summary judgment. Frost, Bernards and Koches responded. Within the response, Frost, Bernards and Koches requested that the district court grant summary judgment in their favor. The district court orally ruled on these motions, denying all. *See* Motion for Summary Judgment Hearing Transcript hereinafter "MSJ T" pg:57, l:19-21. The district court never issued a written order.

A judge trial was held. The district court issued Findings of Fact, Conclusions of Law and Order filed October 1, 2009 (hereinafter referred to as

"the Final Order.") The district court incorrectly concluded that Smith and Clark could use Scenic Drive to access their property. The district court found that the granting language was not specific in nature. The district court then found that Scenic Drive was a more convenient and reasonable access to Smith and Clark's property than Prospectors Loop.

By making these conclusions, the district court erred in two separate ways. First, the granting language is specific in nature. That granting language clearly shows that Smith and Clark's access is limited to Prospectors Loop. Furthermore, if the granting language is not specific in nature, then the district court failed to correctly cite the appropriate case law; which lead to a misapplication of the case law. The district court was required to, yet failed to review the historic use of the proposed easement in order to insure that the proposed use is not an increased burden to the servient estates. In fact, because Scenic Drive was never used by Smith and Clark, allowing Smith and Clark to use it now is a significant increase in the burden on the servient estates. Because Smith and Clark and their predecessors in interest have always used Prospectors Loop to access Tract 15, they must be limited to that access.

The district court also erred when it allowed Dave Albert, a surveyor, to testify regarding septic permit requirements. Mr. Albert was not an expert in this field. When questioned, he stated that he was only somewhat familiar with the

requirements. The district court relied on Mr. Albert's testimony regarding septic permit requirements its conclusion.

The district court also erred when it concluded that Mrs. Frost must remove the gate that she placed on Tract 11. The district court incorrectly concluded that because Mrs. Frost stood in the shoes of the grantor, the covenant language must be construed against her. Furthermore, because Smith and Clark had an easement, they should be allowed to freely enjoy their easement without the interference of the gate. Therefore, Mrs. Frost must remove the gate. This was an erroneous conclusion.

As such, the district court's decision must be reversed because of the denial of summary judgment. In the alternative, the district court's decision must be reversed because the district court misquoted and misinterpreted the law. The district court's decision regarding Mrs. Frost's gate must also be reversed because the district court misquoted and misinterpreted the law. Costs and attorneys fees must be awarded to the Frost, Bernards and Koches pursuant to the covenants. If the decision is not reversed, then the decision must be remanded for a new trial because the district court allowed Mr. Albert to testify regarding septic permit regulations and then materially relied on that testimony in its conclusion.

STATEMENT OF THE FACTS

a. Factual Background.

On March 13, 1987, Yellowstone Basin Properties, Inc., (hereinafter referred to as "YBP") purchased a large parcel of land known as "Pipestone." At that time, YBP was in the business of purchasing large ranches, subdividing the ranches into twenty plus acre tracts and selling the tracts of land. Pipestone was one of a number of parcels of land developed by YBP. Pipestone includes the tracts of land and easements at issue in this matter. *See* Trial Transcript ("TT") pg:265 l:8-18.

All of Pipestone was subdivided into twenty-plus acre parcels. The Certificate of Survey No. 139926 was filed on April 15, 1987, dividing the property into Tracts 1-19 and Tracts 21-54. *See* Plaintiff's Exhibit 2 (Please note that parties stipulated to all Exhibits before trial, unless otherwise noted in this brief. Therefore, there will be no reference to the transcript per M.R.App.P., Rule 9 because the Exhibit was admitted before the trial.) The COS does not show any road easements.

YBP created and recorded Declaration of Covenants, Conditions and Restrictions on April 29, 1987. *See* Plaintiffs' Exhibit 3. On December 8, 1987, YBP filed Declaration of Covenants, Conditions and Restrictions First Restatement, the purpose of which was to include additional tracts 55-74 in the covenants. *See* Plaintiffs' Exhibit 4. The Original Covenants and Amended

Covenants are identical, except for language necessary to include the additional tracts of land. Therefore, any reference to "Covenants" shall include both the Original Covenants and Amended Covenants.

Paragraph C of the Covenants states that YBP and the Hansons intended the Covenants to be placed on the property for the benefit of the owners and future owners of the property. *See* Plaintiff's Exhibit 2, paragraph C of the Covenants. Paragraph 7 of the Covenants provides:

> All Tract owners covenant, agree and understand that the Declarant is reserving a sixty-foot (60') easement for general ingress and egress and a general easement for public utilities across the above-described real property along the road routes set forth in the attached Exhibits, A-1, A-2, A-3, A-4 and A-5. Public utilities will follow roads where practical. The road easement shall be thirty fee (30') on each side of the centerline of the road system to be constructed by Declarant on said property during the calendar years 1987, 1988 and 1989, along the approximate routes set forth in the attached Exhibits A-1, A-2, A-3, A-4 and A-5. Because of the many "old" roads in the area, all Tract owners agree to be limited to the roads set forth as dotted lines or continuous lines on the attached Exhibits A-1, A-2, A-3, A-4 and A-5, reference to which is hereby made. All existing roads within the "Pipestone" Surveys not shown on the attached Exhibits A-1, A-2, A-3, A-4 and A-5, are not to be used by the Tract owners for ingress and egress, unless such road use is with permission of the Tract owner. It is understood and agreed by all parties to this Declaration and all Tract owners that the summer access roads will be constructed by the Declarant during the calendar years 1987, 1988 and 1989. This Declaration is intended to confirm that each Tract owner will have the right of ingress and egress on said road system from the county road to his property. The approximate road location set forth in the

> attached Exhibits A-1, A-2, A-3, A-4 and A-5 are also hereby designated, where applicable, as roads for ingress and egress and easements for utilities to the unsurveyed land herein described. Declarant reserves the right to fill supplemental exhibits, showing the approximate location of the roads, as built, on the balance of the above described property.

Exhibits A-1, A-2, A-3, A-4 and A-5 attached to the Covenants show the "approximate location" of the road system easements. *See* Plaintiff's Exhibit 4. (For easy reference, *please see* Plaintiff's Exhibit 5.)

Exhibit A-1 depicts the approximate location of the road easement in dispute. Tract 15 is currently owned by Smith and Clark. The dashed lines going through the west side of Tract 15 represent the approximate location of Prospectors Loop. Prospectors Loop was used by all of Smith and Clark's predecessors in interest to access Tract 15. The dashed lines that traverse Tract 7, Tract 10, Tract 11 and Tract 12 represent Scenic Drive. *See* Plaintiff's Exhibit 5. Scenic Drive is the easement at issue in this matter.

The Covenants specifically provide in paragraph 11:

> Tract owners covenant and agree that no gates, fences or other obstructions shall be placed upon or block any access road. This restriction shall not prevent a Tract owner from placing a gate on an access road if the road terminates on that Tract owner's property. A Tract owner may place, at his expense, a cattle guard in said road, if the cattle guard in constructed to county road specifications and has a concrete block or concrete foundation. Any cattle guard placed in an

> access road must have a gate on one side of the cattle guard for use by livestock, horses and by persons using the road for purposes of ingress and egress.

These tracts are commonly referred to as "termination tracts." Tract 13 is a termination tract. TT pg:246 L:3-12, pg:276 L:24-25.

When YBP sold a tract to a buyer, YBP used a YBP standard form warranty deed. All of the tracts at issue in this matter were sold by YBP to the purchasers by this warranty deed. (*See* Plaintiff's Exhibits 10, 11, 12, 15 and 16.)

All of the initial Warranty Deeds in Smith, Clark, Frost, Bernards and Koches's chain of title issued from YBP to Mrs. Frost or the predecessors in interests of Smith, Clark, Frost, Bernards and Koches contained the specific language granting to the grantees,

> all tenements, hereditaments, and appurtenances thereto belonging, including any water rights appurtenant to this property, including a general non-exclusive sixty foot (60') easement for ingress to and egress from the above described lot or tract and a general easement for public utilities across other lots or tracts described in Certificate of Survey Number 139926, Folio 296B for public utilities.

All the Warranty Deeds in Smith, Clark, Frost, Bernards and Koches's chain of title from YBP contained the following exception and reservation unto YBP and its successors and assigns:

> excepted from this conveyance and reserved unto the Grantor, and the Grantor's Successors and Assigns, a general non-exclusive sixty-foot (60') road easement for ingress and egress and a general easement for

> public utility lines across the above described land. *The location of all road easements shall be thirty feet (30') on each side of the center line of the road system to be constructed by the Grantor during the calendar years 1987-1988-1989.* ... The location of said roads providing ingress and egress are set forth and governed by the Declaration of Covenants, Conditions, & Restrictions and Exhibits thereto.

Emphasis Added.

On June 15, 1987, Defendants Robert Roy Pennock and Marilyn Frost's predecessors in interest in their chain of title for Tract 13, Richard Anthony Cutet was conveyed Tract 13 by YBP. The deed was recorded on February 26, 1988. *See* Plaintiff's Exhibit 10.

On November 19, 1987, Plaintiff's predecessor in interest in their chain of title, Ralph Hoffman was conveyed from YBP, Tract 15. The Warranty Deed was recorded with the Jefferson County Clerk and Recorder on November 25, 1987. *See* Plaintiff's Exhibit 7.

On June 9, 1987, Defendants Donald and Elizabeth Bernard predecessors in interest in their chain of title, Paul Joseph and Lynne Carol Sadowski were conveyed Tract 10 by YBP. The Warranty Deed was recorded with the Jefferson County Clerk and Recorder on January 31, 1987. *See* Plaintiff's Exhibit 15.

On August 31, 1987, Defendants Donald and Elizabeth Bernard's predecessors in interest in their chain of title, Joe and Sherri Mashburn were

conveyed Tract 7 by YBP. The Warranty Deed was recorded with the Jefferson County Clerk and Recorder on September 10, 1987. *See* Plaintiff's Exhibit 16.

Mrs. Frost and her former husband, Mr. Michael Pennock, purchased Tract No. 11 directly from YBP on September 3, 1987. *See* Plaintiffs' Exhibit 11.

Before purchasing, Mrs. Frost met with Wayne Joyner (hereinafter referred to as "Mr. Joyner") and discussed the easements, covenants and warranty deed language. TT pg:244, l:9-25. YBP was owned and operated by Wayne Joyner. Mr. Joyner had a silent partner. However, Mr. Joyner made almost all of the major and day to day decisions regarding how to subdivide, market and sell YBP's properties. TT pg:265 l:8-18, pg:283 l:9-20.

It was Mrs. Frost's understanding that Scenic Drive was built for the exclusive use of Tracts 6, 7, 10, 11, 12 and 13. Scenic Drive was not to be used by any other tract for the purpose of ingress and egress to any other tracts of land. TT pg:245, l:1-20. Furthermore, it was her understanding that Scenic Drive was a dead end road. TT pg:245, l:16-17

Also before purchasing Tract 11, Mrs. Frost and her husband spent a week "living" in their recreational vehicle on the tract of land. It is important to note that in her Affidavit accompanying the response, Mrs. Frost stated that the developer had built the road after she purchased Tract 11. That was a typo. TT pg.252 l:6-25

and pg:253, l:1-24. She explained that in Court. The fact of the matter is because of the large boulders and steep terrain, it would have been impossible for Mrs. Frost to get a motor home onto Tract 11 unless the road to the tract was already built. Furthermore, it was always her recollection that the road, as built, ended at the boundary of Tract 12 and 13. *See* Marilyn Frost's Affidavits in Court Record and TT pg:257, l:9-20.

Mrs. Frost's recollection of the timing is consistent with Mr. Joyner's testimony. According to Mr. Joyner, the roads to those properties would have been built before any of the above owners purchased the properties. This is because each phase was sold from "green grass to green grass." TT pg.269, l:8-9. This meant that in the spring, then the roads were built, the sales people took pictures of the green tracts and new roads, then sales were made. TT pg.289, l:23-25, 290, l:1-16.). He also testified that he would have directed the road builder to build the road up to the boundary of Tract 12 and 13, but no further since doing so was an extraneous cost. However, Mr. Joyner does not remember what the road builder actually built. TT pg.289, l:23-25, 290, l:1-16.

Mr. Albert also testified that the roads in each area would have been built all at one time. In other words, the road builder would have built Scenic Drive all at one time; as opposed to building part of Scenic Drive, then coming back at a later date to finish the road on Tract 13. TT pg:179, l:24-25, pg:180, l:1-8. Mr. Albert

testified that he did not know when the road was built, or where Scenic Drive was built. TT pg.186, l:10-17, pg.187, l:11-18.

Soon after purchasing Tract 11, Mrs. Frost and her husband built a vacation retirement home on Tract 11 and moved there. They spent summers there from that date and retired there in 1995. TT pg:246, L:12-20. They purchased Tract 13 while they were living on Tract 11. TT pg:244, L:23-24. Michael Pennock passed away after they retired to the property. TT pg:239, L:7. The owners of Tract 12 and Mrs. Frost entered into an agreement where Mrs. Frost has the first option to purchase Tract 12 should the Koches ever desire to sell it. That agreement is still in effect.

With the permission of Koches, Mrs. Frost placed a gate on Tract 11. The gate is to keep hunters from accessing Tracts 11, 12 and 13. A few years ago a group of hunters entered Mrs. Frost's property and killed a deer right in front of her front porch. For her safety, she placed the gate on the road. *See* Mrs. Frost's affidavits in support of Summary Judgment.

As Mrs. Frost has camped and/or lived directly on Scenic Drive from the first year the development was created, she is well aware of the past use of Scenic Drive. No one has used Scenic Drive to access Tract 15 since she has purchased Tract 11 in 1987. TT pg:247, L:3-18. Past owners of Tract 15 and/or Tract 14

have asked Mrs. Frost's permission to use Scenic Drive in the past. However, Mrs. Frost always denied such permission as she and her family purchased the land for its privacy. TT pg:249, L:3. Tract 15 never contributed to any maintenance of Scenic Drive. *See* Plaintiffs' Exhibit 36. Mrs. Frost improved the road a great deal since purchasing the property. At the time she purchased it, the road was essentially a roughed in two track drive. TT Pg:253, l:22-24. Because of Mrs. Frost's efforts, it is now a fairly substantial driveway. *See* Plaintiffs' Exhibit 23 and 24.

Mrs. Bernard also testified regarding the maintenance and use of Scenic Drive. She verified that Scenic Drive was never used by Tract 15. TT pg.202, l:9-11. If fact, she called Smith and Clark's realtor and told the realtor that Scenic Drive was not an access for Tract 15. The Smith and Clark's realtor confirmed that Tract 15's access was Prospectors Loop. TT pg:202, l:7-11. Mrs. Bernard also verified she and Mrs. Frost maintained Scenic Drive. TT pg:202, l:12-18.

Smith and Clark purchased Tract 15. Once they purchased the land, they attempted to use Scenic Drive to access Tract 15. Frost, Bernards and Koches denied Smith and Clark access. Soon after Smith and Clark sued for access to Tract 15 by use of Scenic Drive.

b. Procedural History.

Smith and Clark filed this matter on February 8, 2007. Smith and Clark filed a motion for summary judgment on or about July 25, 2008. (See Smith and Clark' Motion for Summary Judgment hereinafter referred to as "P's MSJ.") Plaintiff's motion argued that the conveying documents clearly granted to all successors in interest a general, non-exclusive 60 foot easement. Therefore, Smith and Clark could use all existing roads, and build an easement to Tract 15 from anywhere on the existing roads.

Defendant Ms. Frost and Mr. Robert Pennock (Mrs. Frost's son, who was dismissed in the pretrial order as he is not an owner of any tract) filed a response on August 11, 2008. (See Defendants' Pennock and Frost's Response hereinafter referred to as "D's Frost's Response.) Mrs. Frost and Mr. Pennock requested summary judgment on their behalf. Their argument was that the conveying language was clear; however, the plain language of the conveying documents restricted Tract 15's access to Prospectors Loop.

Mr. and Mrs. Bernard and Mr. Koch filed a separate response to P's MSJ around August 6, 2008. They joined Mrs. Frost and Mr. Pennock's arguments. In addition, they argued that the plain language of the conveying documents stated that Scenic Drive, in its entirety, was a private driveway.

Smith and Clark filed their reply brief on or about August 25, 2008. The district court held a summary judgment motion hearing on October 1, 2008. At the end of the hearing, the district court orally denied all summary judgment motions. In addition, at the summary judgment hearing, the district court decided to actually view the easements. The parties attorneys and the district court viewed the actual easements and tracts of land soon after.

A judge trial held on two days. The first trial day was May 20, 2009. The second trial day was July 17, 2009. On October 1, 2009 the district court issued its Final Order.

The Final Order held that there were no reasonable building sites on westerly portions of Tract 15 because the only site upon which a septic tank drain field could be located would be on the eastern portion of Tract 15. *See* Final Order, FOF No. 31. The district court also concluded that the purpose of the easement was not just for ingress and egress, but for ingress and egress to specific building sites on each tract of land. *Id.* FOF No. 30.

The district court then concluded that the granting language was not specific enough to determine where the easement was located. *Id.* COL No. 5 and 6. The district court misquoted *Mason v. Garrison* (2000), 299 MT 142, 998 P.2d 531 and incorrectly concluded that when there are two accesses to a tract of land, the

district court must determine whether one route or the other is reasonably necessary and convenient for the purpose for which it was created. *Id.* COL No. 6. Instead of reviewing historical use, the district court reviewed the new proposed use. The district court then erroneously concluded that the only reasonably necessary and convenient access was Scenic Drive. *Id.* COL No.7. No mention was made by the district court whether Prospectors Loop provided access to these sites, just that it was not a convenient access to the Smith and Clark's preferred building sites. *Id.* COL No. 7.

Furthermore, the district court erroneously held that the grant of the easement should be construed against the grantor. Final Order COL No. 8. It is a long upheld rule that real property grants involving reservations of rights are to be resolved in favor of grantor. MCA § 70-1-516, *Van Hook v. Jennings*, 1999 MT 198, P12, 295 Mont. 409, 983 P.2d 995. Essentially, the district court then incorrectly concluded that because Frost, Bernards and Koches were forced into protecting the covenants, they stood in the shoes of the grantor. Therefore, any ambiguity had to be resolved against the Frost, Bernards and Koches. *Id.* COL No. 9-13. Based on this error, the district court mistakenly concluded that Smith and Clark could use Scenic Drive as an access. It also mistakenly concluded that Mrs. Frost must remove her gate. Final Order, COL No. 12.

Based on the fact that Frost, Bernards and Koches defended the covenants, and the covenants included an attorney's fee provision, the district court erroneously awarded Clark and Smith attorney's fees. Final Order, COL No. 13.

STANDARD OF REVIEW

a. Summary Judgment Standard

The Supreme Court reviews a district court's decisions on motions for summary judgment de novo. *Frame v. Huber*, 2010 MT 71, ¶7, 355 Mont. 515 ___ P.3d ____. The Court uses the same summary judgment standards found in M.R.Civ.P., Rule 56.

M.R.Civ.P., Rule 56(c) provides that a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn there from in favor of the party opposing summary judgment. *Redies v. Attorneys Liability Protection Soc.*, 2007 MT 9, ¶26, 335 Mont. 233, 150 P.3d 930.

The party moving for summary judgment bears the initial burden of establishing the absence of any genuine issue of material fact and entitlement to

judgment as a matter of law. *Hughes v. Lynch*, 2007 MT 177, ¶8, 338 Mont. 214, 164 P.3d 913. If this burden is met, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to prevail under the applicable law. *Klock v. Town of Cascade* (1997), 284 Mont. 167, 174, 943 P.2d 1262, 1266. The determination that the moving party is or is not entitled to judgment as a matter of law is a legal conclusion. *Hughes*, ¶8.

b. Review of a Court's Findings of Fact and Conclusion of Law Standard

The Court affirms the factual findings of a district court sitting without a jury unless those findings are clearly erroneous. M. R. Civ. P. 52(a). A district court's findings are clearly erroneous if they are not supported by substantial evidence, if the district court has misapprehended the effect of the evidence, or if a review of the record leaves the Supreme Court with the definite and firm conviction that a mistake has been committed. The Court views the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court's findings. *Steiger v. Brown*, 2007 MT 29, ¶16, 336 Mont. 29, 152 P.3d 705.

Furthermore, the Supreme Court reviews a district court's conclusions of law to determine whether the trial court's interpretation was correct. *Steiger*, ¶16.

c. Expert Witness Ruling Standard

The Supreme Court reviews a district court's evidentiary rulings for an abuse of discretion. *Busta v. Columbus Hosp. Corp.* (1996), 276 Mont. 342, 353, 916 P.2d 122, 128. Absent a showing of such abuse we will not overturn a district court's ruling on the admissibility of evidence. *Christofferson v. City of Great Falls*, 2003 MT 189, ¶8, 316 Mont. 469, 74 P.3d 1021. A court abuses its discretion if it acts "arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *Valley Bank v. Hughes*, 2006 MT 285, ¶16, 334 Mont. 335, 147 P.3d 185.

The trial court is vested with great latitude in ruling on the admissibility of expert testimony. The determination of the qualification and competency of expert witnesses rests largely within the trial judge, and without a showing of an abuse of discretion, such determination will not be disturbed. *State v. DuBray*, 2003 MT 255, ¶38, 317 Mont. 377, 77 P.3d 247.

ARGUMENT

a. The District Court erred when it Denied Summary Judgment in Favor of Frost, the Bernards and the Koches.

The district court should have granted summary judgment to Frost, Bernards and Koches because the conveying language clearly and unambiguously limited grantees access to the roads as built by developer and Scenic Drive, as built by developer, does not touch Tract 15. There are two potential accesses. One access would be to access Tract 15 over Tract 12. The other access would be to access Tract 15 over Tract 13. However, Scenic Drive was not meant to access Tract 15.

"A grantor may expressly reserve an easement over granted land in favor of retained land by using appropriate language in the instrument of conveyance. *Blazer v. Wall*, 2008 MT 145, ¶27, 343 Mont. 173, 183 P.3d 84. "An express easement by reservation arises when a property owner conveys part of his or her property to another, but includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way." *Blazer*, ¶27.

The breadth and scope of an easement are determined by the actual terms of the grant. *Mary J. Baker Revocable Trust v. Cenex Harvest States,*

Coops., Inc., 2007 MT 159, ¶18, 183 P.3d 83, 164 P.3d 851. When interpreting deeds, the rules of contract interpretation govern. MCA § 70-1-513. "The construction and interpretation of a contract is a question of law." *Mary J. Baker Rev. Trust,* ¶19. "Likewise, whether an ambiguity exists in a contract is a question of law." *Id.* "If the language of a contract is unambiguous--i.e., reasonably susceptible to only one construction--the duty of the court is to apply the language as written." *Id.* "However, if the language of a contract is ambiguous, a factual determination must be made as to the parties' intent in entering into the contract." *Id.*

"The determination of whether an ambiguity exists in a contract is to be made on an objective basis." *Mary J. Baker Rev. Trust,* ¶20. Thus, "a conclusion of ambiguity is not compelled by the fact that the parties to a document, or their attorneys, have or suggest opposing interpretations of a contract, or even disagree as to whether the contract is reasonably open to just one interpretation." *Id.* "Rather, an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings." *Id.*

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." MCA § 28-3-301; accord MCA § 1-4-103

("In the construction of an instrument, the intention of the parties is to be pursued if possible."). "The mutual intention of the parties, in turn, is to be ascertained from the writing if possible." MCA § 28-3-303. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter." (meaning MCA § 28-3-101 et seq.) *Mary J. Baker Rev. Trust,* ¶21.

In addition, evidence of the circumstances under which the contract was made and the matter to which it relates may be considered. MCA § 28-3-402 ("A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."); MCA § 28-2-905(2). "The parol evidence rule does not exclude other evidence of the circumstances under which the agreement was made or to which it relates." *Mary J. Baker Rev. Trust,* ¶21. However, such evidence of circumstances and subject matter is not admissible to add to, vary, or contradict the terms of the contract. See MCA § 28-2-904.

In the construction of an instrument, the intention of the parties is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former so a particular intent will control a general one that is inconsistent with it. MCA § 1-4-103. The

whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. MCA § 28-3-202.

In the warranty deed, YBP granted all original purchasers of the Tracts at issue "a general non-exclusive sixty foot (60') easement for ingress to and egress from the above-described lot or tract and a general easement for public utilities across other lots or tracts described in Certificate of Survey Number(s) 139926, Polio 296B for public utilities." The warranty deed then goes on to describe the location of these roads and the governance of the roads.

> *The location of all road easements shall be thirty feet (30') on each side of the center line of the road system to be constructed by the Grantor during the calendar years 1987-1988-1989...*The location of said roads providing ingress and egress are set forth and governed by the Declaration of Covenants, Condition & Restriction and Exhibits thereto.

See Plaintiffs' Exhibits 7, 10, 11, 12, 15 and 16, emphasis added. Therefore, the grant of access easement was not unlimited. The plain language of the warranty deed states that each property's access was to be limited to location of the roads as set forth in the Covenant/Exhibits and as constructed by YBP. *See* Plaintiffs' Exhibit 4. In this case, the original

YBP's warranty deeds and Covenants were clearly intended to be read together.

According to Section 7 of the Covenants, "all tract owners agree to be limited to roads set forth as *dotted lines or continuous lines* on the attached Exhibits A-1, A-2, A-3, A-4 and A-5." *See* Plaintiff's Exhibit 4. Furthermore, "This Declaration is intended to confirm that each Tract owner will have the right of ingress and egress and easements for utilities to the unsurveyed land herein described." *Id.*, emphasis added. While YBP reserved the right to file supplemental exhibits showing the roads as built, it did not do so. As Tract 12 and 13 are the only properties bordering Tract 15, the access from Scenic Drive must be across one of those two tracts.

Tract 13 is a termination tract. Regarding termination tracts, the Covenants specifically provide in paragraph 11:

> Tract owners covenant and agree that no gates, fences or other obstructions shall be placed upon or block any access road. This restriction shall not prevent a Tract owner from placing a gate on an access road if the road terminates on that Tract owner's property. A Tract owner may place, at his expense, a cattle guard in said road, if the cattle guard in constructed to county road specifications and has a concrete block or concrete foundation. Any cattle guard placed in an access road must have a gate on one side of the cattle guard for use by livestock, horses and by persons using the road for purposes of ingress and egress.

Plaintiff's Exhibit 4.

Therefore, the owner of Tract 13 can bar access to all others by a locked gate if the owner desires. This means that any part of Scenic Drive beyond the boundary of Tract 13 is a private driveway. No one, but the owner of Tract 13 may use the driveway. To hold otherwise would make Paragraph 11 moot, which is inconsistent with Montana law. MCA § 28-3-202. Therefore, based on the plain language of all of the conveying documents, Tract 13 is not a public road, but a private driveway. As such, it cannot provide access to Tract 15.

Furthermore, the plain language of the covenants states that the roads were set forth in dotted and continuous lines. *See* Section 7 of the Covenants, Plaintiffs' Exhibit 4. The dotted lines run parallel to Tract 15. *See* Plaintiffs' Exhibit 5. The dotted lines terminate at the boundary of Tract 12 and 13, going no further.

Therefore, the road does not exist where there is a lack of a dotted or continuous line. As there is no dotted or continuous line traveling into Tract 15 from Tract 13, the road terminates at Tract 13. Thereafter, it is a private driveway.

Regarding Tract 12, both surveyors agreed that Scenic Drive, including the entire sixty foot easement, does not ever touch Tract 15 while traveling through Tract 12. *See* Plaintiffs' Exhibit 19 and Defendants' Exhibit A. In order to access Tract 15 over Tract 12, Smith and Clark would have to exit the easement and travel over private property. Thus, as the easement does not enter Tract 15 in Tract 12, there is no easement to Tract 15 from Tract 12.

Therefore, as Scenic Drive does not enter into Tract 15 from Tract 12, and Scenic Drive is a private driveway on Tract 13, it is not an easement to Tract 15. Summary judgment must be granted to Frost, Bernards and Koches. Because Frost, Bernards and Koches are defending the covenants, attorneys fees and costs must be awarded to them. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

b. District Court erred when it Concluded Smith and Clark have an Easement over Scenic Drive Because it is More "Reasonable and Convenient" than the Easement Used by Smith and Clark and their Predecessors in Interest for over Twenty Years.

In the alternative, if the granting language is not specific in nature, then the Court must find that Smith and Clark do not have an easement over

Scenic Drive because historically, Scenic Drive was never used to access Tract 15. Instead, Prospectors Loop was the exclusive easement to Tract 15. Unfortunately, the district court incorrectly cited both the case law and the statute it relied upon to come to the district court's legal conclusion that Smith and Clark could use Scenic Drive. If the district court had correctly cited the case law and statute, its legal conclusion would be that Smith and Clark do not have an easement over Scenic Drive.

Correctly cited, the case law state that where an easement's granting language is not specific in nature, courts must look beyond the plain language of the grant in defining the scope and breadth of the servitude:

> If the easement is not specifically defined, it need only be such as is reasonably necessary and convenient for the purpose for which it was created. It is sometimes held . . . where the grant or reservation of an easement is general in its terms, that an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner.

Mason v. Garrison, 2000 MT 78, ¶22, 299 Mont. 142, 998 P.2d 531, *Strahan v. Bush* (1989), 237 Mont. 265, 268, 773 P.2d 718, 720 (quoting 25 Am. Jur. 2d Easements and Licenses § 73, at 479). Under such circumstances, the question of what may be considered reasonably necessary and convenient in light of the easement's intended purpose is determined with a view to the situation of the

property and the surrounding circumstances. *Mason v. Garrison*, 2000 MT 78, ¶22, 299 Mont. 142, 998 P.2d 531.

The district court misquoted *Mason*. In citing to *Mason*, the district court stated "[w]hen the granting language is not specific and there are separate routes to a parcel of land, the Courts must look beyond the plain language of the grant to determine whether one route or the other is reasonably necessary and convenient for the purpose of which it was created with a view to the situation of the property and the surrounding circumstances." Final Order, COL No. 6.

This is not the law. The district court left out the fact that the easement "need only be such as is reasonable and convenient for the purpose of which it was created." *Mason,* ¶22. The "need only be" language is very important to this law. The district court's interpretation seems to infer that it is free to choose any of the available easements. However, the "need only be" language means that the district court is limited to finding an easement that is not more than was it needed. Furthermore, the district court left out the language regarding the fact that when a grant is not specific, past use of the parties fixes the easement. This is very important to this case.

Mason continues stating "It is well settled that no use may be made of an easement different from that established at the time of its creation, so as to burden

the servient estate to a greater extent than was contemplated at the time of the grant." *Mason,* ¶26. This statement was left out by the district court.

In every case where the granting language is not specific, the courts determined the "situation of the property and the surrounding circumstance" by reviewing historical use. *See Mason,* ¶¶23-27, *Strahan v. Bush* (1989), 237 Mont. 265, 268, 773 P.2d 720-21, *Ponderosa Pines Ranch Inc., v. Hevner*, 2002 MT 184, ¶16, 311 Mont. 82, 53 P.3d 381.

This makes sense. If the granting language is not specific, then a person cannot look to that language to determine if the proposed use is an additional burden on the servient estate. The only way to determine if the proposed use is an additional burden is to look at historical use. As stated in the *The Law of Easements and Licenses in Land*, "[o]nce an inadequately described easement is fixed by use and acquiescence, the holder cannot successfully claim that a different width or route is reasonably convenient or necessary." *See* JON W. BRUCE AND JAMES W. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:6, at 7-12 through 7-16 (2001). Therefore, if the easement is not specific, then the scope of the easement is determined by the historical use. The dominant estate cannot come back later and attempt to allege that the easement it used is not actually reasonable and ask for a different easement.

Because the district court failed to cite all of the above law, the district court mistakenly focused on whether Smith and Clark's proposed use was reasonable and convenient instead of reviewing the historical use of the property. By doing this, the Court failed to weigh whether the proposed use was an additional burden on the servient estates.

Furthermore, the law states that ambiguities in a reservation of rights in any grant of property are to be interpreted in favor of the grantor. MCA § 70-1-516; *Van Hook v. Jennings*, 1999 MT 198, ¶12, 295 Mont. 409, 983 P.2d 995. However, the breadth and scope of an easement are determined upon the actual terms of the grant. *See* MCA § 70-17-106; *Van Hook v. Jennings*, 1999 MT 198, ¶12 295 Mont. 409, 983 P.2d 995.

The district court also misquoted MCA § 70-1-516. Instead, the district court concluded that ambiguities are to be interpreted in favor of the grantee. Final Order COL No. 8. This, of course, is exactly the opposite of what the law states. Therefore, any holding based on this interpretation is incorrect. One of the holdings based on this misinterpretation is that Smith and Clark have an easement over Scenic Drive. Final Order, COL No. 10.

There is no question that the district court's legal conclusions regarding what the law states are incorrect. The question becomes, if the district court had correctly cited and applied the law, would the legal conclusion regarding the

easement be resolved differently? The answer is yes. If the district court had applied the correct law, then Smith and Clark would not have an easement over Scenic Drive.

In this case, the granting language is not specific. It grants an easement 30 feet on either side of the center of the roads "to be built by developer." As one can see from the record, trying to determine where the developer built the road over twenty years ago is impossible. First, memories fade. Second, people who were there when the roads were built, or near the time the roads were built are no longer on the property or in the area. Third, the roads were maintained by the new owners of the land, obviously causing changes in the developer built roads. The more time passes, the more difficult it will be for anyone to determine where the roads were built by developer.

Since the granting language is not specific, the Court must look at the historical use of the property to determine if the proposed use creates an additional burden on the servient estate. From the time that Scenic Drive was established, it was never used as an access for Tract 15. There is absolutely nothing in the record to contradict this finding. Thus, it is clear that the proposed use would be an additional burden on the servient estates. Furthermore, the access established by use to Tract 15 is Prospectors Loop. This access was used by all of Smith and Clark's predecessors in interest. Smith and Clark cannot now come back and say

that Prospectors Loop is not reasonably convenient or necessary as that is how of Smith and Clark's predecessors in interest accessed Tract 15.

Therefore, Scenic Drive is not an easement to Tract 15. The district court's decision must be reversed. Because Frost, Bernards and Koches are defending the covenants, attorneys fees and costs must be awarded to them. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

c. The District Court erred When it Allowed Dave Albert, a Surveyor, to Testify about Septic Regulations.

Mr. Albert is a surveyor with no specialized knowledge regarding septic requirements. Mr. Albert testified that he only worked with engineers who would had the specialized knowledge regarding septic requirements. He testified that he was only somewhat familiar with the regulations regarding the installation of septic tanks. TT pg:159, l:4. Furthermore, when asked about drainfield regulations he responded "[t]hey've become so voluminous in the last few years that I can't keep up with them, but I know the general requirements." TT pg:159, l:6-9. Frost, Bernards and Koches objected on the basis of Mr. Albert's qualifications, but were overruled by the district court. TT pg:159, l:16-20.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." M.R.Evi., Rule 702. Based on his own testimony, Mr. Albert was not an expert in septic systems and drainfield regulations. He is not an engineer by education. He does not keep up to date on the current regulations. Instead, his only experience comes from working with the actual experts in septic systems. This does not make Mr. Albert an expert in septic system and drainfield regulations. Furthermore, the district court abused its discretion when it allowed Mr. Albert to testify regarding septic systems. The district court then specifically relied upon Mr. Albert's testimony regarding septic regulations in makings it findings; this was a material mistake. The Court must remand this case back to the district court for a new hearing.

d. The District Court erred when it Concluded that Mrs. Frost's Gate must be Removed.

Based on its erroneous conclusion that Smith and Clark had an access, and that contracts involving reservations must be construed against the Grantor, the Court concluded that Mrs. Frost must remove her gate place on Tract 11.

The district court concluded that Mrs. Frost must remove the gate based on its misquotation of MCA § 70-1-516 (where district court concluded that

ambiguities are to be interpreted in favor of the grantee, not the grantor.) Final Order COL No. 8. This, of course, is exactly the opposite of what the law states. Therefore, any conclusion based on this interpretation is incorrect.

One of the conclusions based on the district court's erroneous conclusion was that Mrs. Frost must remove her gate so that Smith and Clark can have free access to Tract 15. Final Order, COL No. 11. Furthermore, the Court found that the gate violated Paragraph 11 of the Covenants.

Because Smith and Clark do not have an access to Tract 15 over Scenic Drive, that conclusion is baseless. Regarding Paragraph 11 of the Covenants, Mrs. Frost's gate does not violate this provision. Paragraph 11 states "Tract owners covenant and agree that no gates, fences or other obstructions shall be placed upon or block any access road. This restriction shall not prevent a Tract owner from placing a gate on an access road if the road terminates on that Tract owner's property."

The road terminates on Tract 13, Mrs. Frost's property. She also owns Tract 11 and has an option to purchase Tract 12. TT pg.249, l:12-20. The Koches, the owners of Tract 12, gave her permission to erect the gate. TT pg.250, l:7-12. These are the only tracts affected by the gate. The covenant is silent regarding

where the gate must be placed. It does not state the gate must be placed on the termination tract, just that the owner may put up a gate.

Any ambiguity must be resolved on behalf of the grantor. MCA § 70-1-516 As Mrs. Frost and the Koches stand in the shoes of the grantor (they own the servient estates, Tract 11 and 12) and they do not object to the use of the gate, then the ambiguity must be resolved in their favor. The reality is that if Smith and Clark do not have an easement over Scenic Drive, then the gate harms no one. Furthermore, it increases Mrs. Frost's safety by preventing hunters from accessing her property and discharging their weapons on her front lawn in the future. Therefore, this Court must conclude that Mrs. Frost's gate will remain on Tract 11.

CONCLUSION

The Court must grant summary judgment to Frost, Bernards and Koches as Scenic Drive does not provide an easement to Tract 15. The easement must be through Tract 13 or 12. Tract 13 is a termination tract with no access to the other subdivision owners. In order to cross Tract 12, Smith and Clark would have to exit the easement and pass over private property. Therefore, as a matter of law, Scenic Drive does not provide an access to Tract 15. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and

Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

In the alternative, the Court must reverse the district court's decision regarding the easement because the district court's conclusions of law were incorrect. The granting language is not specific. Therefore, the district court should have looked at the historic use of the easement to determine whether the proposed use was an additional burden of the servient estate. The facts show that Scenic Drive was never used to access Tract 15. Therefore, allowing it to be used as an access now would be an additional burden on all of the servient estates. Furthermore, as all of Tract 15's predecessor's in interest use Prospectors Loop to access the tract, that is the easement established by use. Smith and Clark are precluded from stating Scenic Drive is reasonably convenient or necessary. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

The district court abused its discretion when it allowed Mr. Albert to testify as an expert regarding septic system regulations. By his own admissions, he is not an expert in the field. He does not have the education, skills and experience necessary to give an expert opinion on septic system regulation. He simply works alongside the engineering experts. The district court materially relied upon Mr.

Albert's testimony. Therefore, the district court decision should be remanded for a new trial.

In addition, the Court must reverse the district court's decision regarding the gate because the district court's conclusions of law were incorrect. The granting language is not specific. Any ambiguity must be resolved on behalf of the grantor. Because Mrs. Frost and the Koches stand in the shoes of the grantor, the ambiguity regarding the placement of the gate must be resolved on their behalf. This Court's decision must be to reverse the district court and award costs and attorneys fees to Frost, Bernards and Koches. Furthermore, any order awarding Smith and Clark attorney's fees and costs in the underlying case must be reversed.

Dated on this 21st of May, 2010.

Alanah Griffith, Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

Dated this 21st day of May, 2010.

Alanah Griffith, Attorney for Appellants

CERTIFICATE OF SERVICE

I, hereby certify that on the 21st day of May, 2010, I served the foregoing upon the following person by depositing a copy in the United States mail, postage pre-paid, addressed as follows:

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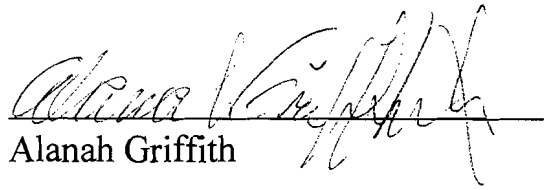

Alanah Griffith